

Nos. 15516-15519

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**United States  
Court of Appeals**  
for the Ninth Circuit

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KEITH C. MORTON,

Appellant,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation,  
Appellee.

ROBERT E. KUNTZ,

Appellant,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation,  
Appellee.

GENE A. PICOTTE,

Appellant,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation,  
Appellee.

JOHN S. MAHAN,

Appellant,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation,  
Appellee.

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**Transcript of Record**

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**Appeals from the United States District Court,  
for the District of Montana.**

FILED



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# INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

	PAGE
Attorneys, Names and Addresses of . . . . .	1
Bond on Appeal . . . . .	33
Certificate of Clerk . . . . .	36
Judgment . . . . .	31
Memorandum and Order of the Court . . . . .	23
Motion to Quash . . . . .	20
Notice of Appeal . . . . .	32
Order of Consolidation . . . . .	40
Petition for Removal . . . . .	3
Ex. A—Affidavit and Application for Writ of Mandamus . . . . .	6
Ex. "A"—Application to Purchase Granted Lands . . . . .	14
B—Order Granting Alternative Writ of Mandamus . . . . .	16
C—Alternative Writ of Mandamus . . . . .	18
Statement of Points . . . . .	34
Stipulation . . . . .	22
Stipulation Re Consolidation . . . . .	38



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St. Paul Minnesota,

Attorneys for Respondent-Appellee.





In the District Court of the United States, in and  
for the District of Montana, Billings Division

No. 1794

STATE OF MONTANA, Ex Rel., KEITH C.  
MORTON,

Relator,

vs.

NORTHERN PACIFIC RAILWAY COMPANY,  
a Corporation,

Respondent.

### PETITION FOR REMOVAL

Comes now the respondent, and, for its petition to remove the above-entitled action or proceeding from the District Court of the First Judicial District of the State of Montana, in and for the County of Lewis & Clark, to the above-entitled court, alleges:

#### I.

That on or about November 19, 1955, relator commenced the above-entitled action or proceeding by filing the initial pleadings in the District Court of the First Judicial District of the State of Montana, in and for the County of Lewis & Clark; that on November 19, 1955, relator caused to be served in Lewis & Clark County, Montana, upon H. R. Cumming, an agent of respondent, copy of an affidavit and application for writ of mandamus, copy of which is attached hereto marked Exhibit "A," copy of an order granting alternative writ of mandamus,

copy of which is attached hereto marked Exhibit "B," and copy of an alternative writ of mandamus, copy of which is attached hereto marked Exhibit "C"; that by said action or proceeding, the relator seeks a writ of mandate compelling the respondent to convey in fee to an individual, Keith C. Morton, by a good and sufficient conveyance, all of the title of respondent to that certain land located in McCone County, Montana, and described as follows:

The Northwest Quarter of Section Thirty-five, Township Twenty-two North, Range Forty-eight East, M.P.M., McCone County, Montana:

that said application requests that respondent accept in return in consideration the sum of \$2.50 per acre for said real estate; that the individual, Keith C. Morton, is the sole beneficiary of the relief prayed for, and the sole party to whom it is claimed in the pleadings respondent is required to execute the conveyance; that the State of Montana has no beneficial interest in the litigation, and does not seek and cannot be granted in the proceeding any relief.

## II.

That the relator, Keith C. Morton, as an individual, claims to be entitled to the relief prayed for under a proper interpretation of the terms and provisions of the Act of Congress of the United States of 1864, 13 Statutes at Large, page 365, and under the terms and provisions of that certain Joint Resolution of the Congress of the United States of May

31, 1870, 16 Statutes at Large, page 378, and under the terms and provisions of the land laws and homestead laws of the United States of America, 43 U.S.C.A., Chapter 7; that in consequence the matter in controversy arises under the laws of the United States.

### III.

That at all times herein mentioned, Keith C. Morton has been, and now is, a citizen and resident of the State of Montana; that at all times herein mentioned the respondent has been, and now is, a corporation organized and existing under and by virtue of the laws of the State of Wisconsin; that the action or proceeding presents a controversy between citizens of different states.

### IV.

That at the time of the commencement of the action or proceeding, and at all times since, the sum or value of the real property involved, and of the matter in controversy, exceeds the sum or value of \$3,000.00, exclusive of interest and costs.

### V.

That petitioner submits herewith a bond with good and sufficient surety in the sum of \$500.00 conditioned as required by Section 1446 (d), Title 28, U.S.C.A.

Wherefore, under the provisions of Sections 1331, 1332 and 1441, Title 28, U.S.C.A., petitioner re-

quests the above-entitled court to accept jurisdiction over this controversy.

COLEMAN, JAMESON &  
LAMEY,

By /s/ COLE CROWLEY,  
Attorneys for Respondent.

Duly verified.

M. L. COUNTRYMAN, JR.,  
ROBERT P. DAVIDSON,  
Of Counsel for Respondent.

### EXHIBIT A

In the District Court of the First Judicial District  
of the State of Montana, in and for the County  
of Lewis and Clark

STATE OF MONTANA, Ex Rel., KEITH C.  
MORTON,

Relator,

vs.

NORTHERN PACIFIC RAILWAY COMPANY,  
a Corporation,

Respondent.

### AFFIDAVIT AND APPLICATION FOR WRIT OF MANDAMUS

State of Montana,  
County of Lewis and Clark—ss.

Ralph J. Anderson, being first duly sworn upon  
oath, deposes and says:

## I.

That he is the attorney for the relator above named; that he makes this affidavit and application as such attorney for and on behalf of said relator for the reason that said relator does not reside in and is not now in the County of Lewis and Clark wherein affiant resides and has his office and for the reason that he is more familiar with the facts herein stated than is the relator above named.

## II.

That the respondent Northern Pacific Railway Company is a corporation created, organized and existing under and by virtue of the Laws of the State of Wisconsin.

## III.

That the said Northern Pacific Railway Company is now and for some time prior hereto was the owner of and entitled to the possession of certain lands and premises located in McCone County, Montana, and more particularly described as follows, to wit:

The Northwest Quarter of Section Thirty-five, Township Twenty-two North, Range Forty-eight East, M.P.M. McCone County, Montana.

## IV.

That the said lands hereinabove described were granted to the predecessor of the respondent Northern Pacific Railway Company, the Northern Pacific Railroad Company, which was a corporation created by and pursuant to an Act of the Congress of the

United States of 1864, 13 Statutes at Large, p. 365; that the said lands hereinabove described were granted to the said Northern Pacific Railroad Company by a certain Joint Resolution of the Congress of the United States of America of May 31, 1870, 16 U. S. Statutes at Large, p. 378; that the said Joint Resolution of the Congress of the United States of America provided in part as follows:

“Provided, that all lands hereby granted to said company which shall not be sold or disposed of or remain subject to the mortgage by this act authorized, at the expiration of five years after the completion of the entire road, shall be subject to settlement and pre-emption like other lands, at a price to be paid to said company not exceeding two dollars and fifty cents per acre \* \* \*”

## V.

That the respondent herein, the Northern Pacific Railway Company, acquired said lands subject to all of the duties, obligations and limitations contained in the said Joint Resolution of the Congress of the United States of America of May 31, 1870, and subject particularly to the provisions of the proviso contained in said Joint Resolution hereinabove set forth; that the said lands hereinabove described have never been sold or disposed of by the said respondent or by its predecessor, the said Northern Pacific Railroad Company, and are not now subject to the mortgage authorized by the said



Joint Resolution of the Congress of the United States of America of May 31, 1870.

## VI.

That the road mentioned and referred to in said proviso of said Joint Resolution is the line of railroad originally commenced by the said predecessor of the respondent and now owned and operated by the respondent; that said line of railroad was fully completed many years ago; that the period of five years after the completion of said railroad has long since expired.

## VII.

That the relator herein is over the age of twenty-one years, is a citizen of the United States of America and is a citizen and resident of the State of Montana; that the relator herein is possessed of all the qualifications required of settlers by the land laws and homestead laws of the United States of America, 43 U.S.C.A., Chapter 7, and is a veteran of two years, four months active service with the U. S. Air Force of the United States of America during World War II, and as such is entitled to all of the rights, privileges and benefits afforded to such veterans by the land laws and homestead laws of the United States of America.

## VIII.

That heretofore and on the 7th day of November, 1955, affiant, acting for and on behalf of and at the direction of the relator herein, presented to the Northern Pacific Railway Company at said Com-

pany's General Office in the City of St. Paul, Minnesota, an application in writing signed, verified and acknowledged in due form by the relator herein to purchase for purposes of settlement the lands and premises hereinabove described under and pursuant to the terms and provisions of the said Joint Resolution of the Congress of the United States of America of May 31, 1870, 16 U. S. Statutes at Large, p. 378, a true and correct copy of which said application, marked Exhibit "A," is attached hereto and by this reference made a part hereof.

#### IX.

That affiant acting for and on behalf of and at the direction of the relator herein tendered with said application the sum of \$400.00 in lawful money of the United States, being \$2.50 per acre for the hereinabove-described lands as provided by said Joint Resolution of the Congress of the United States of America of May 31, 1870, hereinabove quoted.

#### X.

That the relator herein is now ready, willing and able and will, upon conveyance by the respondent herein as required by said provision of said Joint Resolution of the Congress of the United States to the relator herein of the lands and premises hereinbefore described, pay to the said respondent Northern Pacific Railway Company the said sum of \$2.50 per acre for said lands and premises.



## XI.

That it would be idle and useless for the relator herein to tender said sum of \$2.50 per acre for said lands and premises hereinabove described into court for the reason that such tender would not be accepted by the respondent Northern Pacific Railway Company and would be an idle and useless act on the part of the relator herein.

## XII.

That under the terms and provisions of the said Joint Resolution it was and is the duty of the said Northern Pacific Railway Company, respondent herein, to recognize said application and to comply with the demand therein made and convey all of the title to the hereinbefore-described lands and premises granted by the United States to said respondent or its predecessor by good and sufficient conveyance executed by its duly authorized officers or agents to the relator herein.

## XIII.

That notwithstanding said duty the said Northern Pacific Railway Company, respondent herein, refused and still refuses to comply with said provision of the Joint Resolution of the Congress of the United States of America of May 31, 1870, and refused and still refuses to grant the said application of the relator herein and convey all the title to the hereinabove-described lands and premises granted by the United States to said respondent or its predecessor by a good and sufficient conveyance exe-

cuted by its duly authorized officers or agents to the relator herein.

#### XIV.

That by reason of the failure and refusal of the respondent herein as aforesaid relator has been forced to bring this proceeding to obtain a Writ of Mandamus; that the relator for the purpose of this proceeding has been forced to engage the services of an attorney-at-law; that relator herein has engaged the services of affiant to bring this proceeding; that affiant is an attorney-at-law duly licensed and qualified to practice law in the State of Montana; that the sum of \$500.00 is a reasonable attorney fee for the bringing and prosecution of this proceeding.

#### XV.

That relator herein has no speedy or adequate or any remedy at law.

Wherefore, relator prays that an alternative writ of mandamus may issue out of the above-entitled court directed to the respondent herein returnable at a day certain to be fixed by the Court herein and commanding that the said respondent recognize and grant the application of the relator herein, a true and correct copy of which said application, marked Exhibit "A" is attached hereto, and convey to the relator herein by good and sufficient conveyance executed by its duly authorized officers or agents all of the title to the hereinbefore-described lands and premises acquired by said respondent herein or by its predecessors by virtue of the said Joint Reso-

lution of the Congress of the United States of America of May 31, 1870, upon payment to the said company by the relator herein of the said sum of \$2.50 per acre for said lands and premises all as provided in and required by said Joint Resolution of the Congress of the United States of America of May 31, 1870, or show cause before this Court why said respondent has not done so.

That relator recover of the respondent herein his costs herein incurred and expended and damages, including attorney fees in the sum of \$500.00, and for such other and further relief as to the Court may seem meet and equitable in the premises.

RALPH J. ANDERSON,  
Affiant and Attorney for  
Relator.

Subscribed and sworn to before me this 17th day of Nov., 1955.

[Seal] STANLEY P. SORENSON,  
Notary Public for the State of Montana, Residing  
at Helena, Montana.

My commission expires Sept. 30, 1956.

RALPH J. ANDERSON,  
Attorney for Relator.

Duly verified.

## EXHIBIT "A"

## Application to Purchase Granted Lands

To the Northern Pacific Railway Company of St. Paul, Minnesota, and to its Officers, Directors and Agents, and each of them and all of them:

The undersigned, Keith C. Morton, of Conrad, Pondera, County, Montana, hereby applies to purchase for purposes of settlement those certain lands and premises located in McCone County, Montana, and more particularly described as follows, to wit:

The Northwest Quarter of Section Thirty-five, Township Twenty-two North, Range Forty-eight East, M.P.M., McCone County, Montana;

which lands were granted to your predecessor, The Northern Pacific Railroad Company, by that certain Joint Resolution of the Congress of the United States of America of May 31, 1870, 16 U. S. Stat. at Large, p. 378, which Joint Resolution provides as follows:

"Provided, that all lands hereby granted to said company which shall not be sold or disposed of or remain subject to the mortgage by this act authorized, at the expiration of five years after the completion of the entire road, shall be subject to settlement and pre-emption like other lands, at a price to be paid to said company not exceeding two dollars and fifty cents per acre \* \* \*"

You are informed that this application is made and presented to you under, by virtue of and pursuant to the above-quoted provision of the said Joint Resolution of Congress of May 31, 1870, by which you acquired the hereinabove-described lands and premises.

You are further informed that the undersigned, Keith C. Morton, is over the age of 21 years; is a citizen of the United States of America, and is possessed of all the qualifications required of settlers by the Land Laws and Homestead Laws of the United States of America, 43 U.S.C.A., Ch. 7, and is a veteran of two years, four months active service with the U. S. Air Force of the United States of America during World War II, and as such is entitled to all of the rights, privileges and benefits afforded to such veterans by the Land Laws and Homestead Laws of the United States of America.

The undersigned, Keith C. Morton, tenders herewith, by draft upon the First National Bank of St. Paul, Minnesota, made payable to the Northern Pacific Company, the sum of Four Hundred Dollars (\$400.00), being two dollars and fifty cents per acre for the hereinabove-described lands as provided by the hereinabove-quoted provision of the Joint Resolution of Congress of May 31, 1870, and the undersigned, Keith C. Morton, demands that you execute, by your proper officers and agents, and deliver a good and sufficient deed to the undersigned, Keith C. Morton, conveying the hereinabove lands and premises and your entire interest therein in fee



simple absolute without restriction, or reservation whatsoever to yourselves.

Dated this 3rd day of Nov., 1955.

KEITH C. MORTON,  
Applicant.

Duly verified.

### EXHIBIT B

In the District Court of the First Judicial District  
of the State of Montana, in and for the County  
of Lewis and Clark

STATE OF MONTANA, Ex Rel., KEITH C.  
MORTON,

Relator.

vs.

NORTHERN PACIFIC RAILWAY COMPANY,  
a Corporation,

Respondent.

### ORDER GRANTING ALTERNATIVE WRIT OF MANDAMUS

On reading and filing the Affidavit and duly verified Application of Keith C. Morton and good cause appearing,

It Is Hereby Ordered that an Alternative Writ of Mandamus issue out of and under the seal of this

Court directed to the Northern Pacific Railway Company, a corporation, respondent, commanding it that it convey to the relator herein, by good and sufficient conveyance executed by its duly authorized officers or agents all of the title granted by that certain Joint Resolution of the Congress of the United States of May 31, 1870, which said Joint Resolution is more fully referred to in said application on file herein, to the following-described lands:

The Northwest Quarter of Section Thirty-five, Township Twenty-two North, Range Forty-eight East, M.P.M. McCone County, Montana;

upon the payment to said company by the relator herein of the sum of \$2.50 an acre for the said described land, or that in default thereof it show cause before this Court in the courtroom at the Court-house in the City of Helena, County of Lewis and Clark, State of Montana, on the .... day of ....., 1955, at .... o'clock .. m. of said day why it has not done so.

It Is Further Ordered that a copy of said Affidavit and Application be served on said Northern Pacific Railway Company together with a copy of this Order and with said Writ.

Dated this .... day of November, 1955.

.....

District Judge.

## EXHIBIT C

In the District Court of the First Judicial District  
of the State of Montana, in and for the County  
of Lewis and Clark

STATE OF MONTANA, Ex Rel., KEITH C.  
MORTON,

Relator,

vs.

NORTHERN PACIFIC RAILWAY COMPANY,  
a Corporation,

Respondent.

## ALTERNATIVE WRIT OF MANDAMUS

The State of Montana to the Northern Pacific Rail-  
way Company, a Corporation, Greeting:

Whereas, it manifestly appears by the Affidavit  
and Application of Keith C. Morton, the party  
beneficially interested herein, that you have refused  
to recognize and to grant the Application of said  
Keith C. Morton to purchase certain lands and  
premises located in McCone County, Montana, and  
more particularly described as follows:

The Northwest Quarter of Section Thirty-five,  
Township Twenty-two North, Range Forty-  
eight East, M.P.M. McCone County, Montana,  
which lands were acquired by you subject to the  
terms and provisions of that certain Joint Resolu-  
tion of Congress of May 31, 1870, and which appli-



eration was presented to you pursuant to the terms and provisions of said Joint Resolution of Congress of May 31, 1870, 16 Statutes at Large, p. 378, and that there is not a plain, speedy and adequate remedy in the ordinary course of law, and

Whereas, by an order of this Court duly given and made in the above-entitled action on the 18th day of November, 1955, it was ordered that a Writ of Mandamus should issue to you, therefore,

We Do Command You that immediately after the receipt of this Writ you do recognize, accept and grant the said Application of Keith C. Morton to purchase those certain lands located in McCone County, Montana, more particularly described as follows:

The Northwest Quarter of Section Thirty-five,  
Township Twenty-two North, Range Forty-eight East, M.P.M. McCone County, Montana,

pursuant to the terms and provisions of said Joint Resolution of Congress of May 31, 1870, by which said lands were granted and upon the payment to you by the said Keith C. Morton of the sum of \$2.50 per acre for the said lands you execute by your proper officers or agents and deliver to the said Keith C. Morton a good and sufficient conveyance executed by your duly authorized officers or agents conveying to the said Keith C. Morton all of the title to said lands hereinabove described granted by said Joint Resolution of Congress of May 31, 1870. all pursuant to that certain provision of said Joint

Resolution of Congress which is more particularly set forth in relator's Affidavit and Application on file herein, a copy of which is served upon you together with this Writ, or that you show cause before this Court at the courtroom thereof in the City of Helena, County of Lewis and Clark, State of Montana, on the 12th day of December, 1955, at the hour of 10:00 o'clock a.m. of said day why you have not done so.

Witness the Honorable George W. Padbury, Jr., Judge of the above-entitled Court.

Attested by my hand and the seal of said Court this 18th day of November, 1955.

[Seal]

DAVID R. KEMP,  
Clerk;

JUNE J. PRUTTIS,  
Deputy Clerk.

[Endorsed]: Filed December 8, 1955.

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[Title of District Court and Cause.]

### MOTION TO QUASH

Comes now the respondent, and moves for an order quashing the "Affidavit and Application for Writ of Mandamus," the "Order Granting Alternative Writ of Mandamus," and the "Alternative Writ of Mandamus," on the following grounds and for the following reasons:

## I.

That the Congressional Acts and resolutions alleged in the application papers and the Congressional legislative history of said acts do not specially enjoin upon the respondent any duty resulting from any office, trust or station to perform the act sought to be commanded, and it appears upon the face of said papers that there is a speedy and adequate remedy in the ordinary course of law and equity for the enforcement of any rights which relator may have or claim under said acts and resolutions.

This motion is made and based upon the laws of the United States of America, upon the Congressional legislative history of the land grants to the Northern Pacific Railroad Company, predecessor in interest of respondent, upon the decisions of the Supreme Court of the United States and Department of the Interior of the United States, and upon all the pleadings, records, and files herein.

COLEMAN, JAMESON &  
LAMEY,

By /s/ CALE CROWLEY,  
Attorneys for Respondent.

[Endorsed]: Filed December 9, 1955.

[Title of District Court and Cause.]

### STIPULATION

Whereas, there are now pending before the Court Docket Numbers 1794, 1795, 1796 and 1797, involving exactly the same basic legal issues; and

Whereas, the respondent has filed separate motions to quash in each of said four docket numbers; and

Whereas, the same attorneys are representing each of the four relators, and the same attorneys are representing the respondent in each of the four cases;

Now, Therefore, it is hereby stipulated and agreed between the parties hereto, acting through their respective counsel of record, that the parties waive oral argument on the motions to quash in each of the four cases, subject to the wishes of the Court in that regard, and further agree that the separate motions to quash may be all submitted for decision to the Court on written briefs, and that the respondent shall file one original brief in support of the four separate motions to quash on or before November 1, 1956, and that the four relators may answer in one separate brief on or before December 1, 1956, and that the respondent may then reply in one brief on or before December 18, 1956, all subject to the approval of the Court.

Dated this 14th day of September, 1956.

COLEMAN, JAMESON &  
LAMEY,

By /s/ CALE CROWLEY,  
Attorneys for Respondent.

/s/ RALPH J. ANDERSON,  
Attorney for Relator.

[Endorsed]: Filed September 14, 1956.

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In the District Court of the United States, in and  
for the District of Montana, Billings Division

Civil No. 1794

STATE EX REL. MORTON,

Civil No. 1795

STATE EX REL. KUNTZ,

Civil No. 1796

STATE EX REL. PICOTTE,

Civil No. 1797

STATE EX REL. MAHAN,

Applicants,

vs.

NORTHERN PACIFIC RAILWAY COMPANY,  
Respondent.

### MEMORANDUM AND ORDER

It is agreed that the above-entitled causes are all  
alike and counsel have elected to file briefs herein

that apply to each and all of them alike. The said actions were commenced in the First Judicial District of the State of Montana, in and for the County of Lewis and Clark, and in each an alternative writ of mandate was secured requiring the respondent to convey to the applicant in each action the quarter section of land involved therein upon payment by each applicant to the respondent the sum of \$2.50 per acre, or to show cause on a date certain why the said writ had not been complied with.

Thereafter all of said actions were removed to the above-entitled court by the respondent, and motions filed herein to quash each and all of said actions, and also seeking an order quashing the affidavit and application for writ of mandamus, the order granting alternative writ of mandamus and the alternative writ of mandamus in each action.

The motions are identical in all of said actions and the grounds alleged are (1) that the Congressional Acts and Resolutions involved do not specially enjoin upon the respondent any duty resulting from any office, trust or station to perform the acts sought to be commanded, and (2) that it appears upon the face of said papers that there is a speedy remedy in the ordinary course of law and equity for the enforcement of the rights which relator may have or claim under the Acts and Resolutions.

Applicants assert that apparently the second ground appearing in the motions is not relied upon



by counsel for respondent as no argument appears in the briefs in support thereof, and for that reason counsel for applicants have given no consideration to the second ground set forth in respondent's motions.

Applicants assume that the issue here, from the standpoint of respondent, is as stated on page 3 of respondent's brief, and is whether or not what is designated as the settlement and pre-emption proviso of the Joint Resolution of Congress of May 31, 1870 (Res. 67, 16 Stat. 278), applies to the lands here involved which are lands acquired by the respondent in what is known as the second indemnity strip provided for by the Joint Resolution above referred to, wherein the proviso reads as follows:

“Provided, that all lands hereby granted to said company which shall not be sold or disposed of or remain subject to the mortgage by this act authorized, at the expiration of five years after the completion of the entire road, shall be subject to settlement and pre-emption like other lands, at a price to be paid to said company not exceeding two dollars and fifty cents per acre;”

In respect to the meaning of this proviso the position of the respondent is to the effect that the lands here in question in these four actions are not to be considered as lands “hereby granted.”

It seems to be understood and authoritatively determined that lands described as granted lands are

those within the place limits, as distinguished from those lands which are within the indemnity limits, as was held in *Priest vs. N. P. R. Co.*, May 23, 1884, 2 L.Dec. 506:

“Lands within indemnity limits are not granted lands. The company as to those lands does not claim to acquire title until actual selection.”

It was stated by Secretary Lamar in *Northern Pacific v. McRae*, 6 L.Dec. 400:

“Now, the grant provided for in its act of incorporation is every alternate section of public land not mineral (except coal and iron) designated by odd numbers to the amount of twenty alternate sections per mile on each side of said railroad line, through the Territories of the United States, and ten sections per mile on each side of said railroad whenever it passes through any State.

“I am clearly of the opinion that by the joint resolution of May 31, 1870, Congress intended that the grant of twenty sections per mile on each side of the road to aid in the construction of said road should be extended to the whole line of the road including that part of the main line via the valley of the Columbia river through Portland to Puget Sound. This conclusion based alone upon the language of the joint resolution would be confirmed, if confirmation was necessary, by the debates in Con-



gress upon said resolution while it was pending and make clear the manifest purpose of said resolution.”

The debates quoted by the Secretary seem to confirm fully his opinion above noted.

In *Hewitt v. Schultz*, 180 U. S. 139, it was held, and likewise in the many cases cited, that “all speak of the granted lands as those within the place limits.”

In *U. S. v. Northern Pacific Railway Company*, 311 U. S. 317, known as the Land Grant Case of 1940, the court seems to have decided questions of special significance here, and among other things said:

“May 31, 1870, Congress again authorized the company to issue bonds to aid in the construction and equipment of its road, to be secured by mortgage on all of its property, railroad, land grant, and franchise to be a corporation. It further authorized the location and construction of the main railroad via the valley of the Columbia River to Puget Sound and of a branch from the main line across the Cascade Mountains to Puget Sound, and made a grant of land in connection with the construction authorized between Portland and Puget Sound, on the same terms as the original grant. It also provided a second indemnity belt extending ten miles beyond the first on either side of the right of way. \* \* \*.”

“The Resolution of May 31, 1870, granted, as respects the additional line authorized between Portland and Puget Sound, place and indemnity lands, as granted for the original line by the Act of 1864. It also authorized what are spoken of as ‘second indemnity’ belts ten miles wide, on either side of the original indemnity limits, in any state or territory in which the company could not obtain the number of sections intended for it by its charter \* \* \*.”

Counsel for the respective parties to the actions seem to be in accord in regard to the quoted part of the decision of the Supreme Court in *Southern Pacific v. Bell*, 183 U. S. 679, found on page 13 of applicants’ brief, and page 8 of respondent’s reply brief, which is in the following language:

“Undoubtedly the company acquires title to both classes of lands by the 3d section of the granting act; but it acquires a title to lands within the place limits by a present grant; but to land within the indemnity limits, only by a future power of selection. In both cases the statute is the origin of the title; but in the one case it gives instantaneously; in the other it is a mere promise to give in the future, and requires the action of the railroad to perfect it. The words ‘hereby granted’ evidently refer to the former.”

The resolution aforesaid, which the court has considered, and which has been considered and passed

upon by other courts, provides that all lands hereby granted to said company shall be subject to settlement and pre-emption like other lands. It seems quite evident that Congress limited the application of the proviso in the Joint Resolution to "all lands hereby granted," and the meaning of that phrase seems to have been very clearly defined in the two cases of *Southern Pacific v. Bell*, 183 U. S. 679, and *Hewitt v. Schultz*, 180 U. S. 139, and that Congress intended in the language employed only the sections of land wherein title vested in the company in *præ-senti*.

After going over the many authorities cited and relied upon counsel for respondent makes the following pertinent inquiry: "How can the applicants seriously urge that by the foregoing language Congress was making a grant of land in the second indemnity strip in Montana?"

Contention of respondent is that the company acquired title to the indemnity lands between Portland and Puget Sound only by a future power of selection. As to lands east of the Portland-Puget Sound line, the company acquired no title under the Joint Resolution. The resolution specified that lands in the second indemnity strip could be selected only in the same State in which there might be a deficiency in the original grant for that State. In Montana, it required first a grant for the place limits by the Act of 1864, and second, a deficiency in those place limits granted in Montana by the Act of 1864.

That the origin of the title for all lands in Montana was in sections 3 and 6 of the Act of 1864.

It was a bone of contention in the land grant case of 1940, 311 U. S. 317, that Montana was included in the settlement and pre-emption proviso but the court held that it applied only to the new grant of lands between Portland and Puget Sound, and the decree of Judge Schwellenbach in 41 F. Supp. 273 seems applicable here, and our own Court of Appeals in the Ninth Circuit, No. 14983, has given support to that view in *Russell v. Northern Pacific Railway Company, et al.*, wherein a rehearing has recently been denied. (January 21, 1957.)

After due consideration of the able arguments of counsel for the respective parties it seems to have been clearly established that the Joint Resolution granted no lands in Montana; that it made a new grant between Portland and Puget Sound; that the term "hereby granted" in the settlement and pre-emption proviso applied only to the place lands in the new grant, and that the issue here has already been decided. A further citation of cases and discussion of questions raised in the voluminous briefs would seem unnecessary since it now appears convincingly that the issue presented here has already been definitely decided between the parties, leaving no issue to the applicants for further litigation, consequently, being duly advised, and good cause appearing therefor, in the opinion of the court, the said motions to quash in the pending cases should be

granted, and such is the order of the court herein.  
Exceptions allowed counsel.

/s/ CHARLES N. PRAY,  
Judge.

[Endorsed]: Filed February 1, 1957.

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In the District Court of the United States, in and  
for the District of Montana, Billings Division

No. 1794

STATE OF MONTANA EX REL. KEITH C.  
MORTON,

Relator,

vs.

NORTHERN PACIFIC RAILWAY COMPANY,  
a Corporation,

Respondent.

### JUDGMENT

Whereas, the respondent filed herein its motion to quash the affidavit and application for writ of mandamus, to quash the order granting the alternate writ of mandamus, and the alternate writ of mandamus; and

Whereas, the parties hereto, acting through their respective counsel of record, stipulated in writing to submit the above-captioned case to the court on



written briefs for a decision on said motion to quash; and

Whereas, the respective counsel did submit voluminous written briefs to the court, and the court having been fully advised in the premises and having fully considered the motion and the briefs and all matters connected therewith, and having determined that the motion to quash should be granted, and having filed herein an order granting said motion;

Now, Therefore, It Is Hereby Ordered that the above-captioned action be, and it is hereby, dismissed.

Dated this 5th day of February, 1957.

/s/ CHARLES N. PRAY,  
United States District Judge.

[Endorsed]: Filed and entered February 5, 1957.

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[Title of District Court and Cause.]

### NOTICE OF APPEAL

Notice Is Hereby Given that Keith C. Morton, the relator above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the Judgment entered in the above-entitled action by the above-entitled Court on the 5th day of February, 1957, and from the whole thereof.

Dated this 4th day of March, 1957.

/s/ RALPH J. ANDERSON,

/s/ STANLEY P. SORENSON,  
Attorneys for Appellant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed March 6, 1957.

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[Title of District Court and Cause.]

### BOND ON APPEAL

Know All Men by These Presents that we, Keith C. Morton, as principal, and the United States Fidelity & Guaranty Co. as surety, are held and firmly bound unto the respondent, the Northern Pacific Railway Company, a corporation, in the above-entitled cause in the sum of Two Hundred Fifty Dollars (\$250.00) for the payment of which we bind ourselves, our heirs, executors, administrators, successors and assigns firmly by these presents.

Sealed with our seals and dated this 4th day of March, 1957.

The condition of the above obligation is such that whereas the relator in the above-entitled cause has appealed, or is about to appeal from that certain Judgment entered in the above-entitled cause on the 5th day of February, 1957, to the United States Court of Appeals for the Ninth Circuit and it is necessary for him to execute and file a good and sufficient bond to said defendants for the sum of Two Hundred Fifty Dollars (\$250.00) to secure the

payment of costs if said appeal is dismissed or the Judgment affirmed or for such costs that the Appellate Court may award if the Judgment is modified.

Now, Therefore, if the above-named Keith C. Morton and the United States Fidelity & Guaranty Co. shall well and truly pay all costs incurred if the appeal is dismissed or the Judgment affirmed and pay all such costs which the Appellate Court shall award if the Judgment is modified, then this obligation to be void, otherwise to remain in full force and virtue.

KEITH C. MORTON,

By /s/ RALPH J. ANDERSON,  
One of His Attorneys,  
Principal.

[Seal] UNITED STATES FIDELITY  
& GUARANTY CO.,

By /s/ JENNIE JUDD,  
Its Attorney in Fact.

Countersigned:

HENRY & BURNS AGENCY,  
By /s/ DON BURNS.

[Endorsed]: Filed March 6, 1957.

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[Title of District Court and Cause.]

#### STATEMENT OF POINTS

The points upon which appellant intends to rely upon on this appeal are as follows:



1. The Court erred as a matter of law in its memorandum and order Filed February 1, 1957, granting the motion to quash filed by respondent.

2. The Court erred as a matter of law in making and entering its judgment made and entered on February 5, 1957, dismissing the above-entitled action.

3. The Court erred in deciding that the lands involved in this action were not subject to the settlement and pre-emption proviso of the Joint Resolution of Congress of May 31, 1870 (Resolution 67, 16 Stat. 378) reading as follows, to wit:

“Provided, that all lands hereby granted to said company which shall not be sold or disposed of or remain subject to the mortgage by this act authorized, at the expiration of five years after the completion of the entire road, shall be subject to settlement and pre-emption like other lands, at a price to be paid to said company not exceeding two dollars and fifty cents per acre; \* \* \*”

and based upon said decision sustaining respondent's motion to Quash and dismissing the above-entitled action.

/s/ RALPH J. ANDERSON,

/s/ STANLEY P. SORENSON,

Attorneys for Appellant.

Of Counsel:

J. R. VAUGHAN.

Affidavit of Service by Mail attached.

[Endorsed]: Filed March 6, 1957.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,  
District of Montana—ss.

I, E. Warren Toole, Clerk of the United States District Court for the District of Montana, do hereby certify that the annexed papers, to wit:

Judgment Roll, consisting of:

Petition for Removal,  
Affidavit and Application for Writ of Mandamus,  
Exhibit "A" Application to Purchase Granted Lands,  
Order Granting Alternative Writ of Mandamus,  
Alternative Writ of Mandamus,  
Motion to Quash,  
Memorandum and Order of the Court filed Feb. 1, 1957,  
Judgment,

and the following annexed papers; to wit:

Notice of Removal,  
Stipulation,  
Notice of Appeal,  
Bond on Appeal,  
Statement of Points,  
Designation of Contents of Record on Appeal,  
are the originals filed in Civil Action Numbered 1794, State of Montana, ex rel., Keith C. Morton

versus Northern Pacific Railway Company, a corporation, Relator and Respondent, respectively, and designated by the Appellant-Relator, as the record on appeal in said cause.

Witness my hand and the seal of said Court at Great Falls, Montana, this 6th day of April, A.D. 1957.

[Seal]                      E. WARREN TOOLE,  
Clerk as Aforesaid;

By /s/ C. G. KEGEL,  
Deputy Clerk.

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[Endorsed]: Nos. 15516, 15517, 15518 and 15519. United States Court of Appeals for the Ninth Circuit. Keith C. Morton, Appellant, vs. Northern Pacific Railway Company, a Corporation, Appellee. Robert E. Kuntz, Appellant, vs. Northern Pacific Railway Company, a Corporation, Appellee. Gene A. Picotte, Appellant, vs. Northern Pacific Railway Company, a Corporation, Appellee. John S. Mahan, Appellant, vs. Northern Pacific Railway Company, a Corporation, Appellee. Transcript of Record. Appeals from the United States District Court for the District of Montana.

Filed: April 9, 1957.

Docketed: April 15, 1957.

/s/ PAUL P. O'BRIEN,  
Clerk of the United States Court of Appeals for  
the Ninth Circuit.

United States Court of Appeals for the  
Ninth Circuit

Civil Nos. 15516, 15517, 15518 and 15519

STATE EX REL. MORTON, STATE EX REL.  
KUNTZ, STATE EX REL. PICOTTE and  
STATE EX REL. MAHAN,

Applicants,

vs.

NORTHERN PACIFIC RAILWAY COMPANY,

Respondent.

### STIPULATION

Whereas, judgment was rendered in the above-entitled actions in the District Court of the United States in and for the District of Montana, Billings Division, on the 5th day of February, 1957, and

Whereas, the plaintiff in each of said cases within time has perfected an appeal to this court by serving and filing a notice of appeal and a cost bond on appeal to this court, together with a request that the record in each of said cases be certified to the above-entitled court and has paid the statutory fee for filing said notice of appeal at the time said notice was filed, and

Whereas, the issues in each of said cases are identical and that the pleadings which were filed herein are identical except as to the name of the party plaintiff and the description of the lands described

in each complaint. The defendant is the same in each action above named, and

Whereas, these cases were submitted to the trial court for decision on a motion to quash an alternative writ of mandate upon joint briefs there being only one brief presented to the trial court and an identical judgment was entered in each cause except as to the name of the parties.

Now, Therefore, in consideration of the premises, it is mutually agreed and stipulated by and between counsel for respective parties that only one record in one of the above-entitled causes need be printed and that only one brief on behalf of the respective parties need be filed and that the decision of this Honorable Court in the case in which the record and briefs are printed and filed may be controlling and decisive of the issues in each of the other three cases.

Dated this 15th day of March, 1957.

COLEMAN, JAMESON &  
LAMEY,

By /s/ CALE CROWLEY,

Attorneys for Defendant and  
Appellee.

/s/ RALPH J. ANDERSON,

/s/ STANLEY P. SORENSON,

Attorneys for Plaintiffs and  
Appellants.

[Endorsed]: Filed April 23, 1957.

[Title of Court of Appeals and Cause.]

### ORDER

Whereas, counsel for the respective parties in the above-entitled actions have filed in this Court a stipulation that only one record in one of the above-entitled causes need be printed and that briefs in only one of the above-entitled causes on behalf of the respective parties need be filed and that the decision of this Court in the case in which the record and briefs are printed and filed may be controlling and decisive of the issues in each of the other three cases, and

Whereas, it appears from said stipulation of the parties that the issues in each of said cases are identical and that the pleadings filed in each of said cases are identical except as to the name of the party plaintiff and the description of the lands described in each complaint and that the defendant is the same in each action above named, and

Whereas, it appears from said stipulation that the above-entitled causes were submitted to the trial court for decision on a motion to quash an alternative writ of mandate upon joint briefs there being only one brief presented to the trial court and an identical judgment was entered for each cause except as to the name of the parties, and

Whereas, the Court deems the making of such an order appropriate in the above-entitled causes, now therefore



It Is Ordered and This Does Order that the record as designated by the parties be printed in only one of the above causes to be selected by the Clerk of this Court; that briefs be filed on behalf of the respective parties in said cause selected to be printed as hereinbefore set forth and that the decision of this Court in the case in which the record and briefs are printed and filed shall be controlling and decisive of the issues in each of the other three cases.

Done and dated this 19th day of April, 1957.

/s/ WILLIAM DENMAN,  
Chief Judge.

/s/ WALTER L. POPE,

/s/ FREDERICK G. HAMLEY,  
Judges, U. S. Court of Appeals for the Ninth  
Circuit.

[Endorsed]: Filed April 23, 1957.

The first of these was the discovery of gold in California in 1848. This discovery led to a great influx of people to California, and the state became a great center of population. The second was the discovery of gold in Nevada in 1859. This discovery led to a great influx of people to Nevada, and the state became a great center of population. The third was the discovery of gold in Colorado in 1858. This discovery led to a great influx of people to Colorado, and the state became a great center of population.

The fourth was the discovery of gold in Idaho in 1860. This discovery led to a great influx of people to Idaho, and the state became a great center of population. The fifth was the discovery of gold in Montana in 1862. This discovery led to a great influx of people to Montana, and the state became a great center of population.

The sixth was the discovery of gold in Wyoming in 1869. This discovery led to a great influx of people to Wyoming, and the state became a great center of population. The seventh was the discovery of gold in Utah in 1871. This discovery led to a great influx of people to Utah, and the state became a great center of population.

The eighth was the discovery of gold in Arizona in 1876. This discovery led to a great influx of people to Arizona, and the state became a great center of population. The ninth was the discovery of gold in New Mexico in 1878. This discovery led to a great influx of people to New Mexico, and the state became a great center of population.

The tenth was the discovery of gold in Texas in 1880. This discovery led to a great influx of people to Texas, and the state became a great center of population. The eleventh was the discovery of gold in Oklahoma in 1889. This discovery led to a great influx of people to Oklahoma, and the state became a great center of population.

The twelfth was the discovery of gold in Kansas in 1890. This discovery led to a great influx of people to Kansas, and the state became a great center of population. The thirteenth was the discovery of gold in Nebraska in 1891. This discovery led to a great influx of people to Nebraska, and the state became a great center of population.

The fourteenth was the discovery of gold in Iowa in 1892. This discovery led to a great influx of people to Iowa, and the state became a great center of population. The fifteenth was the discovery of gold in Missouri in 1893. This discovery led to a great influx of people to Missouri, and the state became a great center of population.